

ALLEN & OVERY

Mind the gap

Gender pay gap reporting | 2016





Gender pay equality is on its way

It's been a long wait. For six years the gender pay gap reporting provisions in the Equality Act 2010 have lain dormant. These provisions have been brought out of hibernation, and will kick start a pay transparency regime, which is likely to do more for pay parity in five years than equal pay legislation has done in 45 years. Even though a slow starter, it is clear that there is now significant political focus on gender pay gap reporting, and it is destined to become one of the most significant employment developments in many a year.

The new rules will apply to the next compensation round for most employers. However, there is a short window of opportunity to fix or reduce pay and bonus differentials in preparation for the first public airing of your pay gap on or before April 2018. From that point, employers with 250 employees or more will be required to report on an annual basis by the end of April each year.



'[The gender pay gap reporting provisions] are likely to do more for pay parity in five years than equal pay legislation has done in 45 years'

Gender pay gap data to be published

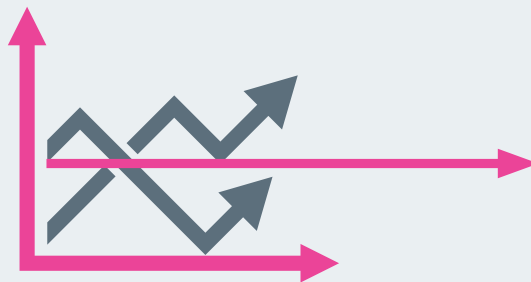
1 Difference in mean pay calculated on 30 April using the employer's usual pay period (eg weekly, fortnightly, monthly).

2 Difference in median pay calculated as above.

3 Difference in mean bonus pay during the 12 months preceding 30 April.

4 Proportion of male and female employees who received bonus pay during the 12 months preceding 30 April.

5 Numbers of male and female employees in the salary quartile pay bands A-D.



Final rules

The proposed regime is subject to a short consultation, ending on 11 March 2016. The Government is consulting on the simple question “What, if any, modifications should be made to these draft regulations?”. What this means is that the regime itself is unlikely to change but the regulations implementing it may need finessing to ensure that what is intended is legally enforceable.

At the moment, the draft regulations lack clarity in a number of areas, and these can either be clarified with additional detail in the regulations or supplemented with guidance. The Government has promised that supplementary guidance will be issued in 2016 to help employers implement the regulations.

The good news

Although administratively complex, this regime is good news for equality and gender diversity, which means it is good news for the bottom line. Credible research from companies like McKinsey has established a link between greater financial performance and diversity, particularly within the senior leadership team.

There are other aspects of the new regime that employers are likely to welcome. It will not require as much work in terms of data crunching or analysis across roles as had been envisaged by some employers. Neither will it lead to a proliferation of equal pay claims, even if there is a significant pay gap. This is because the regulations require percentage differences based on mean and median hourly rates across the entire male and female workforce rather than being the direct like-for-like/equivalent comparison that is required by the equal pay rules. Employers can of course give further statistics based on other comparison groups if they wish to do so. (See further under Equal Pay Claims.)

Actual pay will not need to be disclosed as all figures are expressed in percentage terms. This means that sensitive data around remuneration and bonuses can remain confidential.

Perhaps surprisingly, there are no penalties whatsoever, either civil or criminal, for non-compliance but that does not mean the regime is without a stick or two to encourage employers into pay parity. The reputational risk of sector and best and worst league tables is an effective compliance driver. So too are the benefits for recruitment and retention where the gender pay data positions the organisation as an “employer of choice” in terms of equality and diversity.

‘Credible research from companies like McKinsey has established a link between greater financial performance and diversity’





Financial services employers

The inclusion of bonus gap reporting makes it clear that financial services employers are one of the targets. Following an inquiry into financial services in 2009, the Equality and Human Rights Commission found that women working full-time earned 55% less per year than their male counterparts. This gap was twice as large as the average gap across the economy as a whole at that time. The impact of bonuses was particularly striking, with women on average receiving only a fifth of the annual bonus of men. On the Government's latest figures, the median gender pay gap for financial institution managers and directors is 34.9% compared to a UK average of 9.4%.

Statistics like these, and the mere mention of bankers, bonuses and pay differentials between the highest and lowest earners, will inevitably result in significant public interest, and critical media reporting.

The gap in financial services, as is the case in other sectors like IT, is in part due to the fact that men are disproportionately concentrated in the senior roles. A contextual narrative accompanying the publication of a gender pay gap can explain the composition and structure of the workforce, and the measures taken to ensure gender equality and to encourage women into more senior positions (eg executive accountability, percentage targets for shortlisted candidates for senior positions, unconscious bias training, mentoring programmes, role model examples, diversity and inclusion initiatives, flexible working practices).

Which employers have gender pay reporting obligations?

Private sector employers with 250 employees or more on 30 April each year, starting from 2017, will be required to publish their gender pay gap information within 12 months of that date. An employer for these purposes is the legal entity that employs the employees. In group company structures with numerous subsidiaries, the numbers are not aggregated across the group.

It is therefore possible that in a large organisation, with thousands of employees across the group, one or more of the subsidiary employing companies will be out of scope.

Who is an employee?

The definition of employees has two limbs:

- someone who ordinarily works in Great Britain; and
- someone whose contract of employment is governed by UK legislation.

As an example, an employee who works with a US-based company, under an employment contract governed by US law, is seconded to work in London for four months and is still there on 30 April. This employee would not count towards the threshold because neither condition is met.

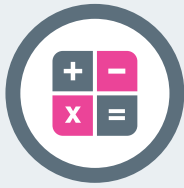
The definition of employee in the draft regulations is not as wide as in the Equality Act, from which this regime emanates. An employee under the Equality Act would also include an individual under a contract personally to do work, which means some contractors and LLP members could be in scope. We understand that the Government has now indicated that the definition of employee is intended to capture apprentices as well as those individuals who work under a contract personally to do work.

The 250 employee threshold is calculated each 30 April, which means an employer may be liable one year but not the next if the number of employees falls to fewer than 250.

Pay

The new regime will require employers to publish their overall mean and median gender pay gaps. By publishing these complementary indicators a more accurate picture of pay is produced: the mean data reports average earnings across the entire workforce, including for the highest and

lowest earners while the median figure produces a result that is not distorted by the highest and lowest earners. The official statistics produced by the Office of National Statistics use both these indicators, so can be used as a comparison with national data.



Calculation of pay

The pay gap reporting is based on the percentage difference in the gross hourly rates of men and women. These rates are arrived at by using a snapshot date of 30 April each year and then by calculating the pay received in the usual pay period ending on 30 April. For example, an employer who pays monthly will calculate the mean (average) hourly rate during April by:

- calculating the weekly pay – the draft regulations do not specify how this is arrived at, but one approach could be to take the average weekly pay during April;

- dividing the weekly pay figure by weekly paid hours to come up with the gross hourly rate of pay;
- totalling the gross hourly rates of pay for men, and then separately for women; and
- deducting the women's total from the men's total and expressing the difference as a percentage of the men's total.

Calculating the median will involve a similar process but with a different formula.



Definition of pay

As currently drafted, pay includes basic pay, shift premiums and car and standby allowances. Based on this definition, financial services fixed pay allowances will be within scope. In line with the definition of pay used by the Office of National Statistics, it includes sick pay, maternity pay and pay in respect of other forms of paid leave, eg shared parental leave. Excluded from the definition of pay are elements such as overtime and benefits in kind.

Based on these inclusions and exclusions, the gross hourly rate may be distorted for organisations with a disproportionate number of men or women. For example, those employers with a high number of women, many of whom are on maternity leave, will artificially reduce the hourly rate for women as the flat rate of statutory maternity pay is £139.58. Providing a contextual narrative about the composition of the workforce will assist interested parties in understanding why the gender pay gap is what it is.

Pay checklist



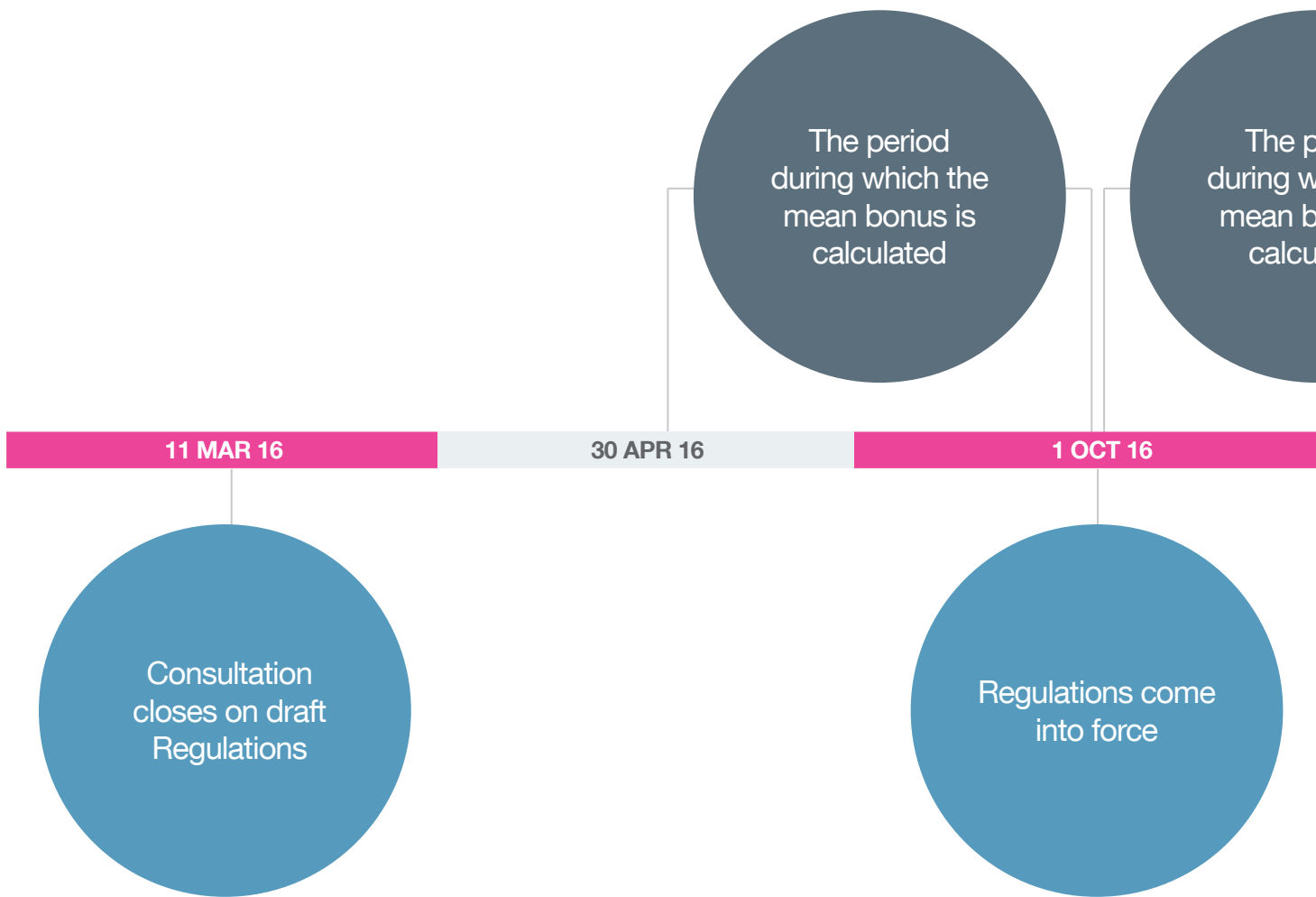
INCLUDES THESE ELEMENTS:

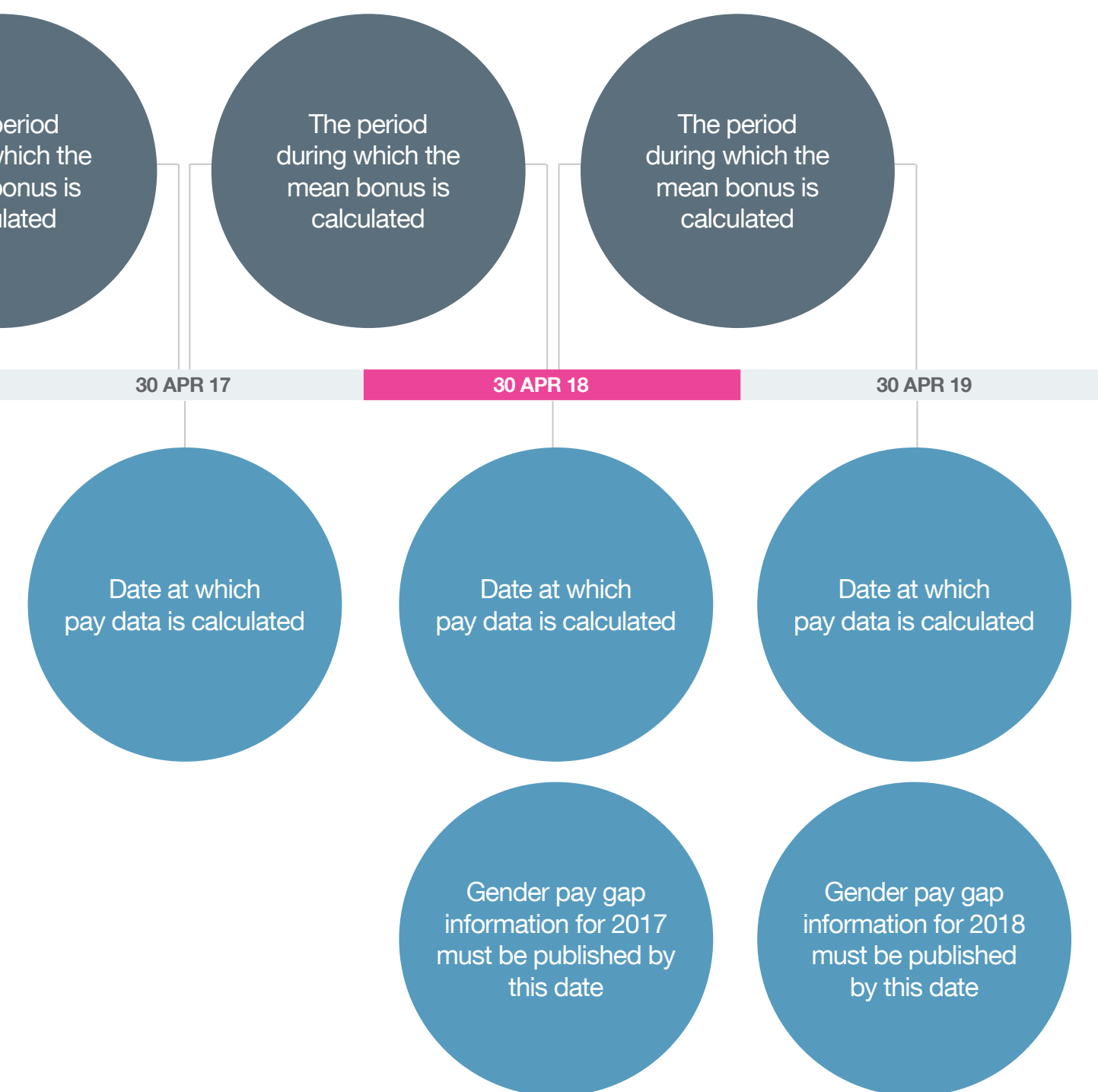
- Basic pay ✓
- Paid leave ✓
- Maternity pay ✓
- Sick pay ✓
- Shift premium pay ✓
- Bonuses ✓
- Fixed pay allowances ✓
- Car and standby allowances ✓

EXCLUDES THESE ELEMENTS:

- Overtime ✗
- Expenses ✗
- Value of salary sacrifice schemes ✗
- Benefits in kind ✗
- Redundancy pay ✗

Timetable





Bonuses

It made front page news back in October when the Prime Minister announced that the gender pay gap reporting requirements would take bonuses into account. The Minister for Women and Equalities, Nicky Morgan, said the Government was “going further than ever before to ensure true gender equality in the workplace”. Certainly, the detail required from two data sets under the new regime will give a multi-dimensional picture of how the bonus pool is being allocated specifically, as well as a general picture of how bonuses tie in with the overall remuneration landscape of the employer.

Employers will be required to publish:

- the mean difference between the bonus payments paid to men and women in the 12 months leading up to 30 April. Bonuses are defined widely (see Bonus box) and include most incentive payments, including commission and the cash equivalent of shares. The results must be expressed as a percentage of the mean pay received by men during the 12 months; and
- the percentage of men and women who received bonus pay during the 12-month period in question.

Unlike the pay gap figures, only the mean data is published for bonuses, not the median.

At this stage it is not clear whether deferred bonuses are taken into account in the calculation as the draft regulations refer to “payments received or earned”. It is likely that deferred bonuses will be within scope as they are technically earned. Hopefully, this is something that will be clarified in the final version of the regulations or supplementary guidance.

Financial services companies may wish to make the point that the bonuses of Material Risk Takers are subject to malus and clawback in any contextual narrative provided.

How is bonus defined?

Payments received or earned in relation to profit sharing, productivity, performance and other bonus or incentive pay, piecework and commission.

Long-term incentive plans (including those dependent on company or personal performance), the cash equivalent of shares on the date of payment.







Salary quartiles



The pay gap data by itself can conceal the distribution of pay. For example, an employer may have pay parity but women may be underrepresented in the highest earning bands. The Government's ambition is to achieve pay parity across the income distribution, which is why the publication of salary quartiles has been introduced into the regime.

Employers will be required to calculate their salary quartiles based on the gross hourly rate for their overall pay range, and then report on the number of male and female employees in each of the pay bands A-D, with A being the lowest band and D the highest.

There are a number of methods of presenting salary quartiles, each with different results. At this stage there is insufficient detail in the draft regulations to know which is the Government's preferred option.

			
BAND D	40	3	HIGHEST PAY   LOWEST PAY
BAND C	112	57	
BAND B	300	275	
BAND A	42	83	

Contextual information

Employers will not be required to provide any contextual information to explain pay gaps. Neither will they be required to describe an action plan showing how the gap will be reduced. Any narrative will be voluntary, but the Government is strongly encouraging employers to provide an explanation.

Employers would be well advised to provide contextual information to explain discrepancies in pay and bonuses. It may be that some employees' pay has been ring-fenced as a result of them being acquired from another business, or that particular employees have been paid more because there was a skills gap in the market. The reasons may not be gender-related or discriminatory. Providing a narrative is an opportunity to explain to your employees why the gap is what it is, and at the same time pre-emptively manage the message to the wider public.



Publication

Ultimately the new regime is about shaming employers into compliance, and providing a platform and megaphone for those employers with good stories to tell. The data (good and bad) will be in the public domain for all to see. If the Women on Boards experience is anything to go by, employers will do their utmost to strive for equality. The annual progress reviews by the Davies Review, together with high-profile media reporting every time a FTSE company has appointed or lost a female board member, drove up the representation of women on FTSE 100 boards from 12.5% in 2010 to 23.55% in 2015.

The information must be published on the employer's website within 12 months of 30 April, and must be accessible by employees and the public. The data must be accompanied by a written statement by a director (or equivalent) as to the accuracy of the information. It should remain on the website for three years, thereby allowing an assessment of the annual progress to be made.

In addition to publishing the data on the website, it must also be uploaded to a Government website. The Government says that this will enable it to identify employers who have complied and to run periodic checks to assess for non-compliance. The Government has hinted that it may publicise the identity of employers that have not complied. By contrast, employers publishing particularly full and explanatory information may be highlighted and heralded by the Government as good practice examples.

So far there is no indication that the Government plans to publish a league table of reported pay gaps. That said, there is nothing to stop the media, pressure groups, trade unions or other interested parties from doing this. The Government has indicated that it wants to produce sector tables of employers' reported pay gaps, which will be very useful for employees and job candidates to assess how their employer rates in comparison to others in the sector.

Timetable

- The Regulations are scheduled to come into force in October 2016
- The first snapshot date to access pay data will be 30 April 2017
- For bonuses, the year to be assessed is 30 April 2016 – 30 April 2017
- The data must be published within 12 months of 30 April 2017, so by 30 April 2018.

This means that employers still have time to put their house in order. There is over one year before the snapshot pay data has to be calculated for the pay gap. For bonuses, the 12-month period starts in April this year and therefore the window of opportunity depends on when the bonus is paid.



So what?

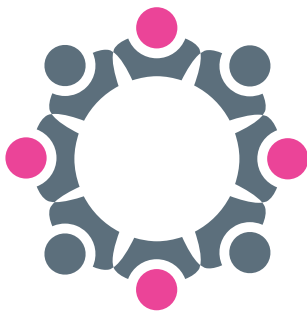
Ironically, there are no enforcement measures whatsoever under this regime. Social engineering will transform the equal pay landscape rather than the threat of litigation or the fear of fines or personal liability. Parity will undoubtedly be achieved within the next decade through transparency, reputation management and the desire to attract, retain and reward on the basis of merit.

This regime is all about gender but it requires employers to put in place an infrastructure that could easily be applied to other protected characteristics such as disability, age and race and ethnicity. Already there is a debate on whether FTSE boards should be ethnically as well as gender diverse. Once the debate gets more traction with FTSE companies, it will undoubtedly have a knock-on effect with employers more generally.

The diversity dividend

The inclusion of salary quartile data together with the percentage of women who receive a bonus adds a new dimension to this regime. While the gender pay gap data sets bring transparency to pay policies, these elements will graphically show how the employer is performing on gender diversity by demonstrating whether the women are predominantly in the lower pay bands, and, broadly, the extent to which women play a role in the leadership of the organisation.

Where the gender pay gap results are challenging, an employer will undoubtedly want to implement a strategy to redress the balance and remove any barriers to women progressing to senior positions. As McKinsey & Company reports in “Why Diversity Matters 2015” companies in the top quartile for gender diversity are 15% more likely to have financial returns above their respective national industry counterparts.



‘Companies in the top quartile for gender diversity are 15% more likely to have financial returns above their respective national industry counterparts’

Equal pay claims

As mentioned above under “The good news” above, the new regime is unlikely to result in a proliferation of equal pay claims. A gender pay gap, or the lack of one, cannot be equated with unequal or equal pay. This is because calculating the gender pay gap does not require employers to conduct an equal pay audit as the publishing requirements are based on the gross hourly rates for men and women without comparing like with like or work of equal value. That said, reporting a significant pay or bonus gap is likely to encourage employees to use all available tools to obtain more granular information to identify if there is any basis for an equal pay claim, including:

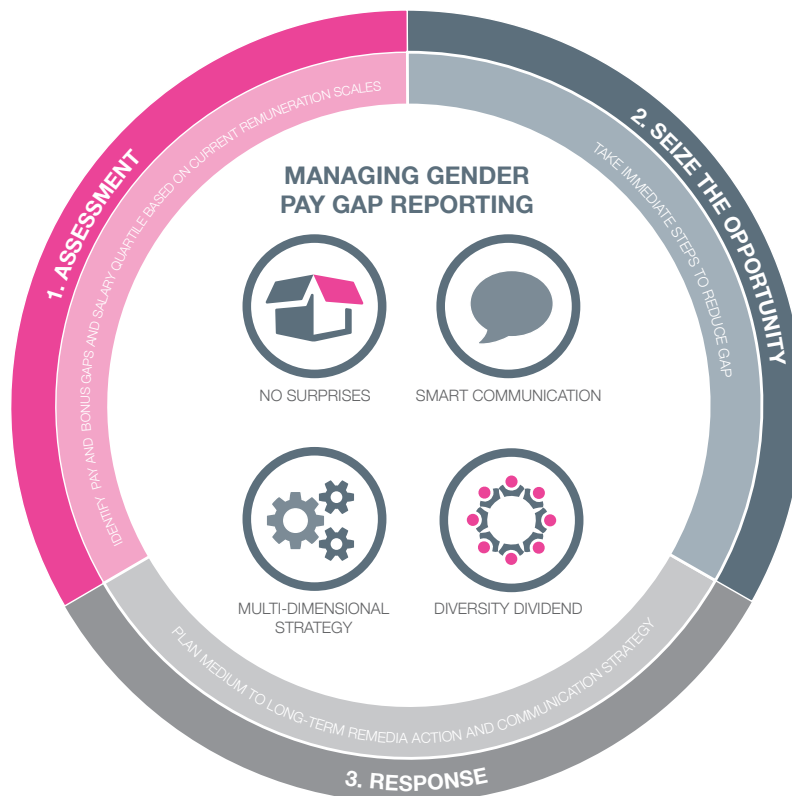
- subject access request to obtain personal data in relation to pay and bonus;
- statutory questionnaire process where pay is a continuing form of discrimination and pre-dates the abolition of the statutory questionnaire process in April 2014;
- non-statutory six step process set out in guidance by Acas; or
- the grievance process.

Take bonus data for example. If an employer does not pay a universal bonus, but awards it to selected staff or groups of staff, the size of pool used to calculate the bonus data will reflect this. This could be compounded with the additional data showing the percentage of this group that are men and women. Add in more detail from a subject access request and either the statutory or non-statutory questionnaire process, and it may be possible to sketch out a more detailed picture of the bonus distribution process. This may or may not be a sufficient basis for an equal pay or discrimination claim, but employees and their lawyers will know that the burden of proof will lie with the employer to rebut a prima facie case of discrimination, and will strategically use this to their advantage. The administrative burden and hassle factor of servicing questionnaires and grievances about potential equal pay claims will be significant, even if there are no, or few, legitimate equal pay claims.



Action plan

- Ascertain whether the employing entity is in scope by calculating the number of employees, not workers, employed by each company.
- Check whether your people software can calculate pay with all the elements required, and remove those that should be excluded.
- Calculate the pay gap based on current pay, and do the same for bonuses for 2015.
- Stress test salary quartiles to establish how men and women fit into the bands using current pay scales.
- Get all the necessary stakeholders together (HR, Diversity & Inclusion, Reward, PR, Legal, Compliance, board champion) to put a short, medium and long-term plan into action to reduce the pay gap.
- Establish the reasons for pay differentials, and prepare to provide contextual information to explain these.
- Take control of the communication agenda. Plan how the gaps will be communicated. What is your communication strategy? If the results are problematic, is this something that will be announced internally first, with an aspirational action plan to get the employees on side prior to publication?
- Are there wider gender initiatives that can be highlighted, such as enhanced pay for shared parental leave, or programmes that support women returning to work after maternity leave? Does your organisation currently have, or is it exploring, CSR initiatives linked to schoolgirls' career aspirations or older working women? In short, what good stories can be highlighted?



Contacts



Mark Mansell

Partner

Tel +44 20 3088 3663
mark.mansell@allenoverly.com



Karen Seward

Partner

Tel +44 20 3088 3936
karen.seward@allenoverly.com



Sarah Henchoz

Partner

Tel +44 20 3088 4810
sarah.henchoz@allenoverly.com



Louise Skinner

Counsel

Tel +44 20 3088 2083
louise.skinner@allenoverly.com



David Cummings

Senior Associate

Tel +44 20 3088 4427
david.cummings@allenoverly.com



Sheila Fahy

PSL Counsel

Tel +44 20 3088 3681
sheila.fahy@allenoverly.com

FOR MORE INFORMATION, PLEASE CONTACT:

London

Allen & Overy LLP
One Bishops Square
London
E1 6AD
United Kingdom

Tel +44 20 3088 0000
Fax +44 20 3088 0088

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